

United States v. Escobar, No. 02-50626

JUN 24 2003

HALL, Circuit Judge, dissenting.

CATHY A. CATTERSON
U.S. COURT OF APPEALS

I respectfully dissent.

The defense attorney became concerned about the defendant's mental capacity during trial. The defense attorney did not attempt to alert the district court to her concerns. In fact, the attorney waited almost five months to request that Escobar be re-examined by a mental health professional. This is not "diligence," under any reasonable definition of that word. The district court's finding to the contrary was clear error. I would reverse on this basis alone because this circuit requires that the discovery of evidence not be on account of a lack of diligence.

More importantly, however, is the fact that there was no newly discovered evidence in this case. In order for evidence to be "newly-discovered," it must have been discovered after trial. See United States v. McKinney, 952 F.2d 333, 335 (9th Cir. 1991) ("We have long held that, in general, a defendant seeking a new trial on the basis of newly discovered evidence must show that the evidence relied on is, in fact, newly discovered, i.e., discovered after the trial.") (internal quotation marks and citations omitted). Before trial, defense counsel had Escobar interviewed by a psychiatrist to evaluate his mental capacity. The psychiatrist advised counsel that Escobar "had a low to average intelligence and that he had no

mental defect” and could function normally. The psychological examination given months later was performed by the same psychiatrist. The psychiatrist never refuted his prior evaluation, he merely assigned an abstract numerical value to Escobar’s intelligence, specifically an “intelligence quotient” of 68. Moreover, the psychiatrist, for the second time, noted that Escobar’s below average intelligence did not affect Escobar’s ability to function normally. This is not “newly discovered” evidence. It is merely a different type of measurement of facts already known to all parties. The district court therefore committed legal error by finding that the evidence was “newly discovered.”

For the foregoing reasons, the district court abused its discretion. I would reverse and remand for sentencing.